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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 **DAVID PHOMMACHANH,**  
12 **Petitioner,**

13 **vs.**

14  
15 **WARDEN F. FOULK,**  
16 **Respondent.**  
17

Civil No. 13-0869 MMA (MDD)

**REPORT AND  
RECOMMENDATION RE:**

**(1) DENYING PETITION FOR  
WRIT OF HABEAS CORPUS;  
and**

**(2) DENYING REQUEST FOR  
EVIDENTIARY HEARING**

18  
19 **I. INTRODUCTION**

20 Petitioner David Phommachanh, a state prisoner proceeding pro se with a Petition  
21 for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenges his conviction in  
22 San Diego County Superior Court Case No. SCD191585 for murder, attempted murder,  
23 assault with a semiautomatic firearm, and gang and gun enhancements. (Pet. at 1-2,  
24 ECF No. 1.)<sup>1</sup> The Court has reviewed the Petition, the Answer and Memorandum of  
25 Points and Authorities in Support of the Answer, the Traverse, the lodgments, the  
26 record, and all the supporting documents submitted by both parties. For the reasons

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28 <sup>1</sup> Page numbers for docketed materials cited in this Report and Recommendation refer  
to those imprinted by the Court's electronic case filing system.

discussed below, the Court recommends the Petition be **DENIED**.

## II. FACTUAL BACKGROUND

This Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parle v. Fraley*, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from these facts, are entitled to statutory presumption of correctness).

The following facts are taken from the California Court of Appeal opinion:

In 2005, [Konrsavanh Donald] Sirypangno and Phommachanh were documented members of the Oriental Killer Boys (OKB) criminal street gang. Sirypangno's gang moniker was "Reckless"; Phommachanh's moniker was "Felon." Other OKB members included Devin Giraud ("Striker") and Steven Joyce ("Turtle").

On the evening of June 11, 2005, Phommachanh drove his out-of-town cousin, Danny Boualouang, and Judy Rattana to a friend's residence and later to a birthday party for a Cambodian girl. Rattana was Phommachanh's girlfriend and the mother of their daughter. [footnote 3 omitted]. Sirypangno, and Joyce and his girlfriend, Melissa Rasasack, drove to these locations in a separate vehicle. OKB member Giraud also was at the Cambodian girl's party. During that party, Rattana learned some of her girlfriends were going to a party in Mira Mesa and decided to accompany them. Rattana left the Cambodian girl's party with her girlfriends. The plan was for Phommachanh to first pick up their daughter at her grandparent's house, take the girl home, then pick up Rattana at the Mira Mesa party and bring her home.

Before Phommachanh went to the Mira Mesa party, he received a call on his cell phone. Boualouang heard Phommachanh tell someone to bring a "strap," which is street jargon for gun, because there might be "some problems" at the party.

At about 11 p.m., Phommachanh, Boualouang and Giraud went to the Mira Mesa party, which was in the backyard of a house at the corner of Lott Point and Santa Armenta Streets. Sirypangno, Joyce and Rasasack went in a separate vehicle.

Access to the party was through a side gate to the backyard; admission cost \$2.00. At first, Phommachanh and the others were not allowed to enter because there were too many people at the party. Phommachanh told the two young men who were manning the gate there would be trouble if he and his friends were not allowed inside. Rattana walked up to the young men at the gate and told them to let Phommachanh and the others in to avoid problems. Phommachanh, Boualouang, Giraud and Rasasack walked into the backyard without paying. Sirypangno and Joyce jumped over the backyard fence.

1           There were a number of altercations at the party that evening,  
 2 including at least one before Phommachanh, Sirypangno and the others  
 3 arrived. While invited guest Hasib Farhan was standing near a young  
 4 woman, he accidentally blew cigarette smoke in her face and almost  
 5 burned her hair. An argument ensued, and Julie Nguyen, who was with  
 the young woman, threatened to have Farhan jumped by OKB members  
 if he did not apologize. Nguyen, who is known to her friends as "Mai," is  
 an affiliate of OKB. After Phommachanh and the others entered the  
 backyard, they were greeted by Mai and the young woman.

6           At one point, some of the invited guests complained that they were  
 7 uncomfortable because Phommachanh and his group were "mad-dogging"  
 8 or staring at people at the party. [footnote 4 omitted.] Farhan, who had  
 9 played football in high school, and some of his friends who also played  
 10 football approached Phommachanh and Sirypangno, who were standing  
 11 next to each other, and told them to calm down or they would have to  
 12 leave. Sirypangno pulled up his shirt, removed a black semiautomatic gun  
 13 from his waistband, racked a round and pointed the gun at Farhan.  
 Although Farhan did not hear Sirypangno say "OKB" or "this is OKB"  
 and did not see Phommachanh flash gang signs, others who were present  
 testified they did. Once the gun was displayed, Farhan's friends pushed  
 him back into the house. Sirypangno and Phommachanh jumped over the  
 back fence and onto a sidewalk. In the process, they knocked out one of  
 the wood planks of the fence.

14           One of the party hosts, Natasha Richardson, who had gone outside  
 15 with Farhan, approached Mai, tapped her on the shoulder and asked Mai  
 to have Sirypangno put the gun away. Mai told Richardson not to touch  
 her, yelled "OKB" and punched Richardson in the face.

16           After Sirypangno and Phommachanh jumped the fence, Sirypangno  
 17 stayed on the sidewalk behind the backyard of the party house, but  
 18 Phommachanh did not. Sirypangno became angry when he overheard  
 19 portions of a conversation between Tylor Thompson [the victim in the  
 20 murder count] and Jeremy Waller, who were standing near the fence.  
 Waller and Thompson were talking about a group of girls who had earlier  
 21 been fighting and wondered where "the bitches" had gone. From the other  
 22 side of the fence, Sirypangno said: "Who you guys calling a bitch?"  
 According to Waller's testimony, he and Thompson replied they were not  
 talking about Sirypangno, they did not know him and they did not call him  
 a bitch. Sirypangno threw a piece of wood over the fence at Waller and  
 Thompson. When Waller and Thompson looked over the fence,  
 Sirypangno pulled up his shirt and displayed the gun in his waistband.

23           Kelly Anderson [the victim in the attempted murder count] who also  
 24 was a friend of Thompson, gave a slightly different version of the over-  
 25 the-fence exchange between Thompson and Sirypangno. Anderson  
 26 testified that Sirypangno said: "What the fuck did you say?" Thompson  
 27 replied: "I don't know what you're talking about, I don't even know you,  
 28 you're tripping" and "I don't know who the fuck you are." Sirypangno  
 said: "You fucking said something, what the fuck did you say, don't be a  
 pussy." Thompson responded: "Fuck you, suck my dick." Anderson  
 testified Sirypangno then said he would catch Thompson outside and  
 threw a piece of wood at them. [FN 7.] After the exchange, Anderson,  
 Thompson, his girlfriend Krystal Abiva, and Brandon Guaderrama, who

1 went to the party with Thompson, remained in the backyard for between  
2 15 and 20 minutes before leaving to allow tempers to calm down.

3 [FN 7:] Elexander Noble, a long-time friend of  
4 Phommachanh, provided another version of the Sirypangno-  
5 Thompson exchange. Noble, who is not a gang member,  
6 testified that Thompson said something to the effect that  
7 "these guys are not real gangsters[;] they're just bitches."  
8 Upon hearing this, Sirypangno responded by saying: "I'm a  
9 real fucking gangster[;] you'll see when you get out."

10 Meanwhile, Phommachanh, Rattana and Boualouang decided to  
11 leave the party and go home. As the trio started walking to the car, Giraud  
12 called out Phommachanh's name and asked him to return. Phommachanh  
13 and Boualouang walked back to see what Giraud wanted while Rattana  
14 continued walking to the car. A visibly upset Sirypangno then approached  
15 Phommachanh and told him about his exchange with Thompson.  
16 According to Boualouang, Phommachanh told Sirypangno not to worry  
17 about it and tried to calm him down. While Sirypangno and  
18 Phommachanh were talking, Rattana drove up to the house. As  
19 Phommachanh stepped into the passenger seat, Sirypangno handed him the  
20 gun. When Rattana asked Phommachanh about the gun, he replied he was  
21 just holding it. Phommachanh then put the gun in the glove compartment.  
22 Rattana drove away and headed home.

23 Within five minutes, Phommachanh received a cell phone call to  
24 come back and pick up Sirypangno. When they returned, Phommachanh  
25 put a bandanna over his face, removed the gun from the glove  
26 compartment and stepped out of the car. Phommachanh waved the gun  
27 and shouted "who wants it"; he then joined Sirypangno, Joyce and Giraud  
28 who were lined up in front of the house waiting for Thompson to emerge  
from the backyard. When Thompson came out, Sirypangno approached  
him, said "you the fool that fucking told me to suck your dick," and  
punched or tried to punch him in the face. Guaderrama then tackled  
Sirypangno and Joyce joined the fight as well. Anderson tried to get  
Thompson to stop fighting and pull him away.

Phommachanh pointed the gun at Thompson, who put his hands up  
and said "no." When the gun did not fire, Phommachanh cleared an  
unfired round from the chamber by racking back the slide of the gun. He  
then fired five shots, striking both Thompson and Anderson. Thompson  
and Anderson struggled to get up and run away, but collapsed.

Phommachanh, Sirypangno, Joyce and Boualouang got into the car  
and Rattana drove away. The group discovered Joyce had been shot in the  
foot. Phommachanh gave the gun to Sirypangno, who told Rattana to  
drive to Giraud's house because they needed to hide "the strap." Rattana  
dropped off Phommachanh and Sirypangno at Giraud's house, where the  
gun was hidden in a rice bin. [FN 8.] Rattana then drove home with Joyce  
and Boualouang. Phommachanh phoned Rattana and told her to get rid of  
Boualouang's clothes, which had blood on it from Joyce's wound. When  
Phommachanh returned home, he tried to clean the blood from his car. He  
also told Rattana and Boualouang to say he was at home that night if  
anyone asked. Phommachanh also phoned Noble (see fn. 7 *ante*),  
who had witnessed the shooting, and told him not to tell anyone what had

1 happened.

2 [FN 8:] During a search of Giraud's residence, police located  
3 the firearm, which was a .45 caliber semiautomatic handgun.  
4 Ballistic tests showed the gun fired the shell casings that  
5 were found at the crime scene. Testing of the DNA collected  
6 from the gun was a mixture of three possible DNA  
7 contributors: Phommachanh, Sirypangno and a third person.

8 Thompson bled to death. He had two gunshot wounds to left side  
9 of his body that could have been caused by the same bullet. One wound  
10 was to the left arm; the other wound was to his left flank. The bullet that  
11 entered the left flank severed the iliac artery and vein.

12 Anderson had gunshot wounds to her abdomen and right hip.  
13 Anderson had surgery to remove her appendix, which had burst, and half  
14 of her colon. She was in the hospital for five days.

15 Detective Daniel Hatfield of the San Diego Police Department's  
16 gang unit testified that at the time of the shooting, OKB was an Asian  
17 criminal street gang with 106 documented gang members. Hatfield said  
18 OKB engaged in a pattern of criminal gang activity and gang's primary  
19 activity were serious assaults, burglaries, automobile thefts and murders.

20 Hatfield also discussed gangs in general and explained that  
21 reputation and respect are of utmost importance to gangs because they  
22 enable a gang to instill fear among rival gangs and people who live in the  
23 community. People who live in the community often are reluctant to  
24 testify against gang members because they fear retaliation from the gang.  
25 Gang members gain respect by committing violent crimes and by backing  
26 up their fellow gang members in fights.

27 Hatfield also testified that disrespect to a gang member is  
28 considered disrespect to the entire gang. Such disrespect can take many  
forms, including a person looking at a gang member in the "wrong way."  
Gang fights easily escalate into violence. When gang members are  
involved in crimes, including murder, the gang's reputation for violence  
increases and the community's fear of and intimidation by the gang  
increases.

(Lodgment No. 12 at 3-10.)

### 22 **III. PROCEDURAL BACKGROUND**

23 On October 14, 2008, the San Diego County District Attorney's Office filed a  
24 fifth amended information charging David Phommachanh with one count of murder  
25 (count one), one count of attempted murder (count two), and one count of assault with  
26 a semiautomatic firearm (count three). (Lodgment No. 1, vol. 2 at 0483-85.) As to  
27 counts one and two, the information also alleged that Phommachanh intentionally and  
28

1 personally discharged a firearm, within the meaning of California Penal Code (Penal  
 2 Code) section 12022.53(d). (*Id.*) As to counts one, two and three, the information  
 3 alleged Phommachanh committed the crimes at the direction of, or in association with  
 4 a criminal street gang and with the specific intent to promote, further and assist in  
 5 criminal conduct by the gang, within the meaning of Penal Code § 186.22(b)(1). (*Id.*)  
 6 As to counts two and three, the information alleged that Phommachanh personally  
 7 inflicted great bodily injury on Kelly Anderson, within the meaning of Penal Code  
 8 § 12022.7(a), and as to count three, the information alleged Phommachanh personally  
 9 used a firearm, within the meaning of Penal Code section 12022.5(a). (*Id.*)

10 Following a jury trial, a jury found Phommachanh guilty of all counts and found  
 11 all the allegations true. (Lodgment No. 35, vol. 32 at 5703-06.) Phommachanh was  
 12 sentenced to seventy-five years-to-life in prison plus seven years. (Lodgment No. 5,  
 13 vol. 32 at 5742.)

14 Phommachanh appealed his conviction and sentence to the California Court of  
 15 Appeal, Fourth Appellate District, Division One. (Lodgment Nos. 7-9.) The state  
 16 appellate court affirmed the convictions in an unpublished written opinion. (Lodgment  
 17 No. 12.)<sup>2</sup> That court also later denied a Petition for Rehearing. (Lodgment No. 14.)

18 Phommachanh then filed a Petition for Review in the California Supreme Court,  
 19 which denied the petition stating, “The petition for review is denied without prejudice  
 20 to any relief to which defendant may be entitled after we decide *People v. Favor*,  
 21 S189317.” (Lodgment No. 17.)<sup>3</sup>

22  
 23 <sup>2</sup> The court of appeal corrected Phommachanh’s sentence, an issue not relevant to his  
 24 challenges in this Court.

25 <sup>3</sup> *People v. Favor*, 54 Cal. 4th 868, 880 (2012) held that “[u]nder the natural and  
 26 probable consequences doctrine, there is no requirement that an aider and abettor reasonably  
 27 foresee an attempted premeditated murder as the natural and probable consequence of the  
 28 target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence  
 of the crime aided and abetted, and the attempted murder itself was committed willfully,  
 deliberately and with premeditation.” Because Phommachanh was the shooter, *Favor* is of no  
 relevance here.

1 Phommachanh then filed a Petition for Writ of Habeas corpus pursuant to 28  
2 U.S.C. § 2254 in this Court on April 10, 2013 [ECF No. 1]. Respondent filed an  
3 Answer and Memorandum in Support of the Answer on July 24, 2013 [ECF No. 9].  
4 Phommachanh filed a Traverse on November 13, 2013 [ECF No. 29].

#### 5 **IV. DISCUSSION**

6 Phommachanh raises five claims in his Petition. First, he claims he was denied  
7 his federal constitutional right to a jury drawn from a cross-section of the community.  
8 Second, he argues the admission of his gang moniker “Felon” and rap lyrics found at  
9 his home violated his federal due process right to a fair trial. Third, he contends the  
10 failure to instruct the jury on the defense of provocation violated his right to have the  
11 jury instructed on the theory of his defense. Fourth, Phommachanh claims there was  
12 insufficient evidence presented that the crimes were committed for the benefit of a street  
13 gang and with the intent to promote, further, or assist a gang. Fifth, Phommachanh  
14 argues the cumulative effect of the errors that occurred at his trial rendered his trial  
15 unfair, in violation of his due process rights. By Order dated August 16, 2013,  
16 Phommachanh’s fifth claim was voluntarily dismissed as unexhausted. (*See* Order  
17 dated Aug. 16, 2013, ECF No. 16.) Respondent argues the state court’s resolution of  
18 claims one through four was neither contrary to, nor an unreasonable application of,  
19 clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 7-18, ECF  
20 No. 9.)

##### 21 *1. Standard of Review*

22 This Petition is governed by the provisions of the Antiterrorism and Effective  
23 Death Penalty Act of 1996 (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320 (1997).  
24 Under AEDPA, a habeas petition will not be granted with respect to any claim  
25 adjudicated on the merits by the state court unless that adjudication: (1) resulted in a  
26 decision that was contrary to, or involved an unreasonable application of clearly  
27 established federal law; or (2) resulted in a decision that was based on an unreasonable  
28 determination of the facts in light of the evidence presented at the state court

1 proceeding. 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding  
2 a state prisoner's habeas petition, a federal court is not called upon to decide whether  
3 it agrees with the state court's determination; rather, the court applies an extraordinarily  
4 deferential review, inquiring only whether the state court's decision was objectively  
5 unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*,  
6 386 F.3d 872, 877 (9th Cir. 2004).

7 A federal habeas court may grant relief under the "contrary to" clause if the state  
8 court applied a rule different from the governing law set forth in Supreme Court cases,  
9 or if it decided a case differently than the Supreme Court on a set of materially  
10 indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may  
11 grant relief under the "unreasonable application" clause if the state court correctly  
12 identified the governing legal principle from Supreme Court decisions but unreasonably  
13 applied those decisions to the facts of a particular case. *Id.* Additionally, the  
14 "unreasonable application" clause requires that the state court decision be more than  
15 incorrect or erroneous; to warrant habeas relief, the state court's application of clearly  
16 established federal law must be "objectively unreasonable." *See Lockyer v. Andrade*,  
17 538 U.S. 63, 75 (2003).

18 Where there is no reasoned decision from the state's highest court, the Court  
19 "looks through" to the underlying appellate court decision and presumes it provides the  
20 basis for the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501  
21 U.S. 797, 805-06 (1991). If the dispositive state court order does not "furnish a basis  
22 for its reasoning," federal habeas courts must conduct an independent review of the  
23 record to determine whether the state court's decision is contrary to, or an unreasonable  
24 application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d  
25 976, 982 (9th Cir. 2000) (overruled on other grounds by *Andrade*, 538 U.S. at 75-76);  
26 *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court  
27 need not cite Supreme Court precedent when resolving a habeas corpus claim. *See*  
28 *Early*, 537 U.S. at 8. "[S]o long as neither the reasoning nor the result of the state-court

1 decision contradicts [Supreme Court precedent,]” *id.*, the state court decision will not  
 2 be “contrary to” clearly established federal law. *Id.* Clearly established federal law, for  
 3 purposes of § 2254(d), means “the governing principle or principles set forth by the  
 4 Supreme Court at the time the state court renders its decision.” *Andrade*, 538 U.S. at  
 5 72.

6       2. *Whether the Jury Represented a Fair Cross Section of the*  
 7       *Community (claim one)*

8       In his first claim, Phommachanh challenges the composition of the jury on  
 9 grounds that it was not drawn from a fair cross-section of the community. (Pet. at 14-  
 10 20, ECF No. 1; Traverse at 10-13, ECF No. 29.) Respondent counters that the state  
 11 court’s denial of the claim was neither contrary to, nor an unreasonable application of,  
 12 clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 12-17, ECF  
 13 No. 9.)

14       Phommachanh raised this claim in the petition for review he filed in the  
 15 California Supreme Court. (Lodgment No. 16.) That court denied the petition without  
 16 prejudice to any relief Phommachanh would be entitled to under *People v. Favor*, as  
 17 noted above. (Lodgment No. 17.) Thus, this Court must “look through” to the state  
 18 appellate court’s opinion as the basis for its analysis under AEDPA. *Ylst*, 501 U.S. at  
 19 805-06. The jury composition challenge was the subject of extensive pre-trial litigation,  
 20 which is aptly summarized by the state appellate court. That court, applying clearly  
 21 established Supreme Court law, wrote as follows:

22               In January 2008, counsel for Brown (see fn. 15, *ante*) filed a  
 23 challenge to the jury venire; he claimed Hispanics were being excluded in  
 24 the central district (downtown) venire. Phommachanh and Sirypangno  
 filed a motion to join Brown’s challenge, which was granted.

25               [FN 15:] The discovery aspects of Phommachanh’s challenge  
 26 to the jury venire were before us in *Roddy v. Superior Court*  
 27 (2007) 151 Cal.App.4th 1115, 1120. Phommachanh and  
 28 Sirypangno, along with Mark Brown, a defendant in a  
 separate criminal proceeding, sought enforcement of  
 subpoenas duces tecum on the jury commissioner to disclose  
 Department of Motor Vehicles (DMV) records used to  
 compile the jury summons lists. After the trial court had

ordered enforcement of the subpoenas duces tecum, the jury commissioner petitioned for a writ of mandate challenging the order. (*Ibid.*) We granted the petition, finding among other things, that Brown, Phommachanh and Sirypangno had not shown the DMV information subject to the subpoenas was relevant to proving their claim of minority underrepresentation because of systematic exclusion. (*Id.* at pp. 1137-1143.)

In May and June 2008, before trial commenced, the trial court in Brown's case conducted an extensive hearing on Brown's claim that Hispanics were underrepresented in the jury venire for the downtown San Diego courthouse, in which he was being tried. [FN17.] The downtown central district has about 45 percent of the county's population, but a disproportionate number of jury trials are held in the central district's courtrooms. For example, in 2007, the central district used 998 jury panels, the North County district used 330 jury panels, the East County district used 326 jury panels and the South Bay district used 83 panels. [FN18.]

[FN17:] San Diego County Superior Court consists of four judicial districts — downtown central, North County, East County and South Bay — which coincide with the county's former municipal court districts before court unification.

[FN18:] Because of the small number of jury trials in the South Bay district, the jury commissioner's office allows prospective jurors to call in to see if they are needed.

In 2007, the jury commissioner's office adopted a 70/30 draw for the central district, which provided that 70 percent of prospective jurors summoned for jury service in the central district were residents of the district and the remaining 30 percent were residents of the three other judicial districts. (See fn. 17, *ante.*) [FN19.] The purpose of the 70/30 draw was to provide all eligible prospective jurors in San Diego County an equal opportunity to be summoned for jury service and to factor in the much higher workload — or need for jurors — in the central district, with its approximately 1,000 annual jury trials. The 70/30 draw was based entirely on population distribution numbers and workload demands; it was not based on race considerations.

[FN19:] Previously, the jury commissioner's office used an 87/13 draw for the central judicial district.

Also in 2007, the jury commissioner's office adopted written policies to standardize the granting of excusals from jury service for medical, financial hardship and language difficulty reasons. The goal was to ensure excusals were legitimately approved.

Brown's demographics expert, John Weeks, a professor of geography and the director of the international population center at San Diego State University, testified that about 19 ½ percent of the county's Hispanic population was eligible to serve as jurors, according to census data. In the central district, the figure is 14.99 percent. Using data from a survey conducted in early 2007 before the jury commissioner adopted

1 the 70/30 draw (see fn. 19, *ante*), Weeks testified that 9.4 percent of the  
 2 people showing up for jury service in the central district were Hispanic,  
 3 which constituted a 9.6 percent absolute disparity and a disparity of 50  
 percent underrepresentation when compared to the countywide figure for  
 the jury eligible Hispanic population.

4 Weeks testified that the disproportionate 70/30 draw for the central  
 5 district did not give everyone in the county an equal opportunity to serve  
 6 and that the boundaries of the judicial districts would have to be changed  
 7 to accomplish such equality. Weeks also testified that the systematic  
 8 exclusion of Hispanics was caused by the jury commissioner's lax and  
 inconsistent policies for granting excusals from jury service — particularly  
 those granted for lack of English proficiency — and the high number of  
 failures to appear in the South Bay judicial district, which has the county's  
 highest percentage of Hispanics.

9 Weeks opined that systematic methods used in the county were  
 10 responsible for the lower percentage of Hispanics in the jury venire for the  
 central district. Weeks also said the 70/30 draw made the situation worse.

11 The prosecution's expert, Michael Sullivan, who operates a  
 12 consulting firm that specializes in statistical analysis, testified Hispanics  
 13 make up 19.59 percent of the county's population who are eligible to serve  
 14 on a jury. Sullivan further testified that under the current 70/30 draw,  
 15 Hispanics made up 17.83 percent of the potential jurors summoned to the  
 16 central judicial district. This amounts to a 1.76 percent (19.59% –  
 17.83%) absolute disparity when compared to the percentage of Hispanics  
 in the countywide population, which was a lower percentage than under  
 87/13 split. Sullivan testified the reason a disparity exists under the split  
 draw system is that the county's Hispanic population is concentrated in the  
 South Bay and North County districts.

17 The trial court found Brown failed to make a prima facie case under  
 18 *Duren, supra*, 439 U.S. 357. The court acknowledged that the first *Duren*  
 19 criterion was satisfied — Hispanics were a cognizable group. (*People v.*  
 20 *Sanders* (1990) 51 Cal.3d 471, 491 [Hispanics constitute a distinctive  
 group in community within meaning of first requirement for *Duren* prima  
 facie case].)

21 However, the court ruled Brown had not met the second and third  
 22 *Duren* requirements. As to the second *Duren* requirement, the court found  
 23 the disparity of Hispanics in the central judicial district compared to the  
 24 countywide Hispanic population was not constitutionally significant under  
 both Week's analysis and Sullivan's analysis. As to the third *Duren*  
 requirement, the trial court found that Brown had not demonstrated that  
 any underrepresentation was caused by systematic exclusion of Hispanics  
 in the jury selection process.

25 The trial court stated it did not put a lot of weight behind the  
 26 statistical evidence presented by expert Weeks because (1) it was largely  
 27 based on the 2007 survey, which took place over a relatively short period  
 (four weeks), and (2) changes implemented by the jury commissioner's  
 office since the survey was conducted most likely reduced any disparity.

28 In sum, the trial court found the jury selection process was race

neutral and that the representation of Hispanics in the venire was fair and reasonable in relation to the number of Hispanics in the county.

### 3. Analysis

Regarding the second *Duren* requirement, we note Weeks opined that there was an absolute disparity of 9.6 percent while Sullivan opined there was an absolute disparity of 1.76 percent. The trial court found both numbers were constitutionally insignificant. Although there have been cases that have held a disparity of less than 10 percent is not constitutionally significant (see e.g., *Swain v. Alabama* (1965) 380 U.S. 202, 208–209; overruled on another ground in *Batson v. Kentucky* (1986) 476 U.S. 79, 100, fn. 25 [10 percent disparity deemed inadequate]), it is difficult to identify a threshold of disparity sufficient to be deemed constitutionally significant under the second *Duren* requirement. (*Bell, supra*, 49 Cal.3d at p. 528, fn. 15.) But certainly, the 1.76 percent disparity figure supplied by Sullivan was constitutionally insignificant. (*Ibid.*) At any rate, we do not have to decide the issue here because the trial court ruled Brown failed to establish a prima facie case under the third *Duren* requirement. (*People v. Burgener* (2003) 29 Cal.4th 833, 857.)

To meet the burden to show that underrepresentation was the result of systematic exclusion — the third element of the *Duren* test — a defendant must establish more than statistical evidence of a disparity. A defendant also must show that the disparity is the result of an improper feature of the jury selection process. (*Bell, supra*, 49 Cal.3d at p. 530.) If a county's jury selection criteria are neutral to race, the defendant must identify some aspect of the manner in which the selection criteria are applied that is constitutionally impermissible. (*Id.* at p. 524.)

Contrary to Phommachanh's appellate contention, the record supports the court's conclusion — namely, whatever the underrepresentation of Hispanics was in the central judicial district venire, it was not caused by systematic exclusion of Hispanics in the jury selection process. Substantial evidence supports the trial court's finding that Weeks's analysis, based on the 2007 survey, deserved little weight. Substantial evidence also supported the court's findings that (1) changes in the jury selection process made after the 2007 survey have likely reduced the disparity of Hispanics in the central judicial district venire and (2) these changes were implemented to provide all eligible prospective jurors in San Diego County with an equal opportunity to be summoned for jury service and to balance the workloads of the judicial districts. The trial court's conclusion that the jury selection process in the county was race neutral was supported by substantial evidence. (Lodgment No. 12 at 34-41.)

As the state court noted, under clearly established Supreme Court law, to establish a prima facie violation of his Sixth Amendment right to a jury drawn from a cross section of the community, a defendant must show:

(1) that the group alleged to be excluded is a "distinctive" group in the community;

1 (2) that the representation of this group in venires from which juries  
2 are selected is not fair and reasonable in relation to the number of such  
persons in the community; and

3 (3) that this underrepresentation is due to systematic exclusion of  
4 the group in the jury selection process.

5 *Randolph v. People of the State of California*, 380 F.3d 1133, 1140 (9th Cir. 2004)  
6 citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

7 The Court agrees with the state court that it is undisputed Hispanics are a  
8 distinctive group in the community, and thus the state court was correct in concluding  
9 the first *Duren* prong was satisfied. As to *Duren*'s second prong, neither the Ninth  
10 Circuit nor the Supreme Court mandates that a specific test that must be used to  
11 determine whether a group is underrepresented in a jury pool. *See United States v.*  
12 *Hernandez-Estrada*, \_\_\_ F.3d \_\_\_, 2014 WL 1687855 (9th Cir., Apr. 30, 2014).  
13 Moreover, in mounting a *Duren* challenge, "the challenging party must establish not  
14 only *statistical* significance, but also *legal* significance," which means that "if a  
15 statistical analysis shows underrepresentation, but the underrepresentation does not  
16 substantially affect the representation of the group in the actual jury pool, then the  
17 underrepresentation does not have legal significance in the fair cross-section context."  
*Id.* at \*8.

18 According to the state appellate court, Weeks testified there was a 9.6% absolute  
19 disparity in Hispanic representation and Sullivan testified there was a 1.76% disparity.  
20 (Lodgment No. 12 at 40.) After a review of the testimony, the numbers do not appear  
21 to be that clear. Weeks did testify there was a 9.6% disparity in Hispanic representation  
22 in the juror pool, but that was the difference between the percentage of Hispanics in the  
23 county (approximately 19%) and the percentage of Hispanics who show up for jury  
24 duty in the Central District (9.4%). (Lodgment No. 5, vol. 10 at 1329-30.) Under cross  
25 examination, Weeks admitted that a comparison between the percentage of Hispanics  
26 who live countywide (approximately 19%) and the percentage of Hispanics who show  
27 up for jury duty county wide (12.2%) leaves a difference of 6.6%. (*Id.* at 1434.) And,  
28

1 a comparison of Hispanics who live in the Central District (15%) and the number of  
2 Hispanics who show up for jury duty in the Central District (9.4%) also leaves a  
3 disparity of 6.6%. (*Id.*) The difference between the countywide average of Hispanics  
4 jurors (12.2%) and the Central District (9.4%) is 2.8%. (*Id.* at 1434-35.) And, as the  
5 state court noted, Weeks's calculations were based on the juror summoning system in  
6 place before the 2007 changes. Sullivan's 1.76% Hispanic disparity number came from  
7 taking the countywide Hispanic jury-eligible population (19.59%) and subtracting the  
8 Hispanic jury-eligible population being summoned to the Central courthouse under the  
9 new 70/30 split (17.83%). (Lodgment No. 5, vol. 11 at 1676-77.)

10 As the state appellate court noted, it is "difficult to identify a threshold of  
11 disparity sufficient to be deemed constitutionally significant under the second  
12 *Duren* prong." (Lodgment No. 12 at 40; *see also Randolph*, 380 F.3d at 1140;  
13 *Herndanez-Estrada*, 2014 WL 1687855 at \*9.) The state court thus chose to avoid  
14 resting its analysis on the second prong because of this ambiguity and instead based its  
15 denial of Phommachanh's representative jury claim on his failure to satisfy the third  
16 prong of *Duren*, that any exclusion was the result of a systematic exclusion of Hispanics  
17 from the jury pool. (Lodgment No. 12 at 40-41.) The Ninth Circuit in *Randolph* found  
18 that a jury pool selection system like the one used in Phommachanh's case did not meet  
19 *Duren*'s third prong. In that case, the Fresno jury commissioner used the voter  
20 registration list and the DMV list to compile its eligible juror pool. *Randolph*, 380 F.3d  
21 at 1140. The Ninth Circuit noted that while "disproportionate exclusion of a distinctive  
22 group from the venire need not be intentional to be unconstitutional, . . . it must be  
23 systematic." *Id.* at 1141. The defendant in *Randolph*, like Phommachanh, did not  
24 satisfy *Duren*'s third prong because he has not established the underrepresentation of  
25 Hispanics is "*inherent* in the particular jury-selection process." *Duren*, 439 U.S. at 366  
26 (emphasis added).

27 In his Traverse, Phommachanh raises a separate equal protection challenge to San  
28 Diego's juror selection process. (Traverse at 10-13, ECF No. 29.) "A Traverse is not

1 the proper pleading to raise additional grounds for relief.” *Cacoperdo v. Demosthenes*,  
 2 37 F.3d 504, 507 (9th Cir. 1994). Additionally, this claim is not exhausted.  
 3 Nevertheless, this Court may deny the petition if it is “perfectly clear that the applicant  
 4 does not raise even a colorable federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 624  
 5 (9th Cir. 2005).

6 The Supreme Court has outlined the appropriate analysis for an equal protection  
 7 claim:

8 The Equal Protection Clause of the Fourteenth Amendment commands  
 9 that no State shall deny to any person within its jurisdiction the equal  
 10 protection of the laws, which is essentially a direction that all persons  
 11 similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216  
 12 (1982). . . . The general rule is that legislation is presumed to be valid and  
 13 will be sustained if the classification drawn by the statute is rationally  
 14 related to a legitimate state interest. [citations omitted]. . . . The general  
 15 rule gives way, however, when a statute classifies by race, alienage, or  
 16 national origin. These factors are so seldom relevant to the achievement  
 of any legitimate state interest that laws grounded in such considerations  
 are deemed to reflect prejudice and antipathy — a view that those in the  
 burdened class are not as worthy or deserving as others. For these reasons  
 and because such discrimination is unlikely to be soon rectified by  
 legislative means, these laws are subjected to strict scrutiny and will be  
 sustained only if they are suitably tailored to serve a compelling state  
 interest. [citations omitted].

17 *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

18 Phommachanh has not shown how he has been treated differently from similarly  
 19 situated individuals on the basis of race or other suspect classifications. And, he does  
 20 not have standing to challenge any equal protection violation Hispanic jurors may have  
 21 suffered. “A successful claim under the Equal Protection Clause . . . requires the  
 22 governmental actor to have discriminated against *the plaintiff*, in the absence of special  
 23 circumstances permitting reliance on rights of third parties. *See Powers v. Ohio*, 499  
 24 U.S. 400, 410–11 [citations omitted].” *Barnes-Wallace v. City of San Diego*, 704 F.3d  
 25 1067, 1085 (9th Cir. 2012) (emphasis added).

26 Given the above, and the deferential standard this Court must apply under  
 27 AEDPA, this Court cannot conclude the state court’s denial of Phommachanh’s jury  
 28 representation claim was contrary to clearly established Supreme Court law, or an

objectively unreasonable application of that law. *Yarborough*, 540 U.S. at 4; *Williams*, 529 U.S. at 412-13. He is therefore not entitled to relief as to this claim.

3. *Admission of Gang Moniker and Rap Lyrics (claim two)*

Phommachanh next claims the trial court improperly admitted evidence that Phommachanh's gang moniker was "Felon" as well as rap lyrics found at his house which detailed OKB gang life and the commission of various crimes. (Pet. at 21-26, ECF No. 1; Traverse at 14-31, ECF No. 29.) The admission of this evidence, Phommachanh contends, violated his right to a fair trial because it was impermissible propensity evidence, the only relevance of which was to portray Phommachanh as an individual with a "criminal disposition" who was predisposed to commit criminal acts. (*Id.*) Respondent counters that because there is no clearly established Supreme Court law which holds that propensity evidence violates due process, the state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Mem. of P & A. Supp. Answer at 17-19, ECF No. 9.)

During the search of Phommachanh's house, police discovered rap lyrics under the mattress of his bed. The lyrics read as follows:

Southeast OKB that's the set that I bang, where real killaz put in work to earn respect in the game, ain't no part time bangers, cause we blastin on sight, so if you tryna pull my card, just watch yo ass tonight, the 15 11 02 gang watching my back, for all yall sneaky [sic] muthafuckaz creeping tryin to attack, got the SK clock'd back one in the chamber, to yall cross town duck cause your lifes [sic] in danger, Oriental Killa Boys straight pushing the line, so take a step up to the plate to see just what you'll find, it's some hard hitting batters and you ain't the first, victim taken out by Killaz, now you rollin in the hurst.

(Lodgment No. 1, vol. 1 at 0155-56.)

///

In addition to the rap lyrics, Detective Daniel Hatfield, a gang expert, testified Phommachanh's gang moniker was "Felon." (Lodgment No. 5, vol. 26 at 4593.) Hatfield further testified the lyrics found at Phommachanh's house were about gang life. Specifically, the writer belonged to OKB, and that members of OKB committed criminal acts to earn respect for the gang. (*Id.* at 4596.) The lyrics also indicated the

1 writer was declaring he was a “real” gang member, not a “want-to-be,” who will shoot  
 2 people on sight, and if someone annoys him, OKB will be there for him. Hatfield  
 3 testified that “SK clock’d back one in the chamber,” meant the writer had a gun ready  
 4 to fire, and individuals who he didn’t like should “duck” because their lives were in  
 5 danger. (*Id.* at 4596-01.)

6 Phommachanh raised his challenge to the admission of this evidence in the  
 7 petition for review he filed in the California Supreme Court. (Lodgment No. 16.) That  
 8 court denied the petition without prejudice to any relief Phommachanh would be  
 9 entitled to under *People v. Favor*, as noted above. (Lodgment No. 17.) Accordingly,  
 10 this Court must “look through” to the state appellate court’s decision denying the claim  
 11 as the basis for its analysis. *Ylst*, 501 U.S. at 805-06. That court wrote:

12 We reject Phommachanh’s argument that the trial court allowed  
 13 impermissible bad acts evidence. Evidence of other crimes or misconduct  
 14 is inadmissible when it is offered to show that a defendant had the criminal  
 15 disposition or propensity to commit the crimes charged. (Evid. Code, §  
 16 1101, subd. (a).) However, evidence of other crimes or misconduct by a  
 17 defendant is admissible if it “[tends to] logically, naturally, and by  
 18 reasonable inference . . . establish any fact material for the people, or to  
 19 overcome any material matter sought to be proved by the defense[.]”  
 (*People v. Peete* (1946) 28 Cal.2d 306, 315.) Evidence Code section 1101,  
 subdivision (b) codifies this exception to the general rule of  
 inadmissibility by providing for the admission of such evidence “when  
 relevant to prove some fact (such as motive, opportunity, intent,  
 preparation, plan, knowledge, identity, absence of mistake or accident . . . )  
 other than [the defendant’s] disposition to commit such [crimes or bad  
 acts].”

20 “[I]f a person acts similarly in similar situations, it can logically be  
 21 inferred that he probably harbors the same intent in each instance.”  
 22 (*People v. Denis* (1990) 224 Cal.App.3d 563, 568.) “The least degree of  
 23 similarity (between the uncharged act and the charged offense) is required  
 24 to prove intent.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)  
 25 We review the admission of evidence under Evidence Code section 1101,  
 26 subdivision (b) for an abuse of discretion. (*People v. Daniels* (1991) 52  
 27 Cal.3d 815, 856 (*Daniels*); see also *People v. Kipp* (1998) 18 Cal.4th 349,  
 28 369 (*Kipp*) [trial court’s determination is essentially a determination of  
 relevance that is reviewed for abuse of discretion].) When reviewing the  
 admission of bad act evidence, a court considers: (1) the materiality of the  
 fact to be proved or disproved; (2) the probative value of the bad act  
 evidence; and (3) the existence of any rule or policy requiring exclusion  
 even if the evidence is relevant. (*Daniels, supra*, at p. 856.)

....

1 Intent to kill and premeditation were material to this case.  
 2 Phommachanh's not guilty plea put in issue all of the elements of the  
 3 offenses, including intent. (*Daniels, supra*, 52 Cal.3d at pp. 857-858.)  
 4 Criminal intent is seldom proved by direct evidence and often must be  
 5 inferred from a defendant's conduct. (*People v. Gilbert* (1992) 5  
 6 Cal.App.4th 1372, 1380.) Statements by a defendant frequently are  
 7 relevant to show intent for the charged crime. (See e.g., *People v. Lang*  
 8 (1989) 49 Cal.3d 991, 1013 [first-degree murder defendant's habit of  
 9 carrying a gun and statements he would "waste" who[ever] interfered with  
 10 him were relevant to his state of mind]; *People v. Rodriguez* (1986) 42  
 11 Cal.3d 730, 756-757 [in murder prosecution defendant's threat against  
 12 victim is relevant to prove intent and a generic threat is admissible to show  
 13 defendant's homicidal intent where other evidence brings actual victim  
 14 within scope of threat].)

15 Gang evidence that is logically relevant to some material issue in  
 16 the case other than character evidence is admissible if it is not more  
 17 prejudicial than probative and is not cumulative. (*People v. Avitia* (2005)  
 18 127 Cal.App.4th 185, 192.) Gang evidence should not be admitted where  
 19 its sole relevance is to show a defendant's criminal disposition or bad  
 20 character. (*People v. Sanchez* 1997) 58 Cal.App.4th 1435, 1449.) But  
 21 where there is a gang allegation, gang evidence will usually be  
 22 admissible.. (See, e.g., *Ferraez, supra*, 112 Cal.App.4th at p. 930 ["expert  
 23 testimony about gang culture and habits is the type of evidence a jury may  
 24 rely on to reach a verdict on a gang-related offense or a finding on a gang  
 25 allegation"].) Moreover, gang evidence is admissible when it "is relevant  
 26 to an issue of motive or intent." (*People v. Funes* (1994) 23 Cal.App.4th  
 27 1506, 1518.) The probative value of motive evidence generally exceeds  
 28 its prejudicial effect because motive typically is the incentive for criminal  
 behavior; therefore, wide latitude is permitted in admitting such evidence.  
 (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; see also *People*  
*v. Martin* (1994) 23 Cal.App.4th 76, 81 [gang activity or membership  
 admissible where "important to the motive . . . even if prejudicial"].)

Appellate courts have found rap lyrics containing gang references  
 to be admissible. (*People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*);  
*People v. Zepeda* (2008) 167 Cal.App.4th 25, 34-35.) [footnote 24  
 omitted.] In *Olguin*, at pages 1372 to 1373, the defendant, accompanied  
 by fellow gang members, shot and killed a rival gang member. A  
 codefendant had written rap lyrics, including in part:

"When I walk out my door I have to pack my fourty-four.  
 R.I.P. there [*sic*] a bunch of punks they will get beat were  
 [*sic*] number 1." (*Id.* at p. 1372, fn. 3.)

Rejecting the argument that the lyrics were inadmissible character  
 evidence, the Court of Appeal held the rap song lyrics were relevant and  
 admissible as to the codefendant to show "his membership in [the gang],  
 his loyalty to it, his familiarity with gang culture, and, inferentially, his  
 motive and intent on the day of the killing." (*Id.* at p. 1373.)

We conclude Phommachanh's rap lyrics, which declared his  
 readiness and zeal to shoot at anyone who ticked him off, were relevant to  
 show intent and motive for the charged crimes. Because the rap lyrics  
 evidence intent, their admission did not violate the statutory restriction on

propensity or character evidence under Evidence Code § 1101, subdivision (a). (*People v. Barnett*, (1998) 17 Cal.4th 1044, 1119.)

(Lodgment No. 12 at 44-47.)

The state appellate court went on to analyze whether the gang lyrics and gang moniker, although admissible, should nevertheless have been excluded under California Evidence Code § 352 as more prejudicial than probative.<sup>4</sup> (*Id.* at 47-50.) The court concluded the state trial judge did not abuse his discretion under that code section in admitting the evidence. (*Id.*)

State evidentiary rulings are not generally subject to federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 70 (1991). Thus, to the extent Phommachanh contends the evidence was admitted in violation of state law, he is not entitled to relief. *Id.* Improper admission of evidence can rise to the level of a federal due process violation, however, if a petitioner can show the admission rendered the trial “fundamentally unfair.” *See Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 897 (9th Cir. 1996).

The state appellate court’s determination that the gang lyrics and gang moniker were relevant to prove motive and intent, which were the main issues before the jury, was not fundamentally unfair. As the state court noted, the rap lyrics were relevant evidence of a willingness to commit murder, affiliation with the gang, loyalty to the gang, and motive and intent on the night of the murder. Although the state appellate court did not explicitly address admission of the gang moniker “Felon,” that, too, was relevant to and probative of the prosecution’s contention that Phommachanh was an active member of OKB and was loyal to the gang. In any event, as Respondent correctly notes, the Ninth Circuit has stated that there is no clearly established Supreme Court law which holds that propensity evidence is inadmissible or violates due process

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<sup>4</sup> California Evidence Code § 352 states as follows: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Cal. Evid. Code § 352 (West 2011).)

1 because the Supreme Court expressly reserved deciding that issue in *Estelle v. McGuire*,  
 2 502 U.S. 62, 75 n.5 (1991). See *Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008);  
 3 *Alberni v. McDaniel*, 458 F.3d 860, 864 (9th Cir. 2006). Where there is no clearly  
 4 established Supreme Court law, a state court's denial of a claim cannot be said to be  
 5 contrary to or an unreasonable application of clearly established Supreme Court law.  
 6 See *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006). As the Ninth Circuit has noted:

7           The Supreme Court has made very few rulings regarding the  
 8 admission of evidence as a violation of due process. Although the Court  
 9 has been clear that a writ should be issued when constitutional errors have  
 10 rendered the trial fundamentally unfair, [citation omitted], it has not yet  
 11 made a clear ruling that admission of irrelevant or overtly prejudicial  
 12 evidence constitutes a due process violation sufficient to warrant issuance  
 13 of the writ. Absent such "clearly established Federal law," we cannot  
 14 conclude that the state court's ruling was an "unreasonable application."

15 *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (citing *Williams*, 529 U.S.  
 16 at 375 and *Musladin*, 549 U.S. at 77).

17           For the foregoing reasons, Phommachanh is not entitled to federal habeas corpus  
 18 relief as to this claim. *Williams*, 529 U.S. at 412-13.

#### 19           4. *Jury Instructions (claim three)*

20           Phommachanh contends the trial court erred when it refused to instruct the jury  
 21 with CALCRIM No. 522 which states that provocation may reduce a murder from first  
 22 degree to second degree. Specifically, Phommachanh argues that had the jury been so  
 23 instructed, they could have concluded he was provoked by the confrontation between  
 24 Sirypangno and the victim, Tylor Thompson, thus negating the premeditation and  
 25 deliberation necessary to convict him of first degree murder. (Pet. at 27-30, ECF No.  
 26 1; Traverse at 32-41, ECF No. 29.) Respondent contends the state court's decision  
 27 rejecting this claim was neither contrary to, nor an unreasonable application of, clearly  
 28 established Supreme Court law. (Mem. of P. & A. Supp. Answer at 19-21, ECF No. 9.)

          Phommachanh raised this claim in the petition for review he filed in the  
 California Supreme Court. (Lodgment No. 16) That court denied the petition without  
 prejudice to any relief Phommachanh would have been entitled to under *People v.*

1 *Favor*. (See Lodgment No. 17.) Accordingly, this Court must “look through” to the  
 2 state appellate court’s opinion denying the claim as the basis for its analysis. *Ylst*, 501  
 3 U.S. at 805-06. That court wrote:

4 CALCRIM No. 522 is a pinpoint instruction, and the trial court has  
 5 no duty to give a pinpoint instruction sua sponte. (*Rogers, supra*, 39  
 6 Cal.4th at pp. 878-879 [addressing CALJIC No. 8.73, the predecessor  
 7 instruction to CALCRIM No. 522].) Although Phommachanh did not  
 8 directly request CALCRIM 522, he argues he did not forfeit this  
 9 assignment of error because he relied upon the prosecutor to supply the  
 10 court with a copy of the instruction. The parties agree — and the record  
 11 shows — provocation instructions were brought up during discussions  
 12 between the court and counsel, and the court specifically asked the  
 13 prosecutor to supply a copy of CALCRIM 522 “just in case.” In light of  
 14 these circumstances, we will reach the substantive issue.

15 What would otherwise be deliberate and premeditated first degree  
 16 murder may be mitigated to second degree murder if the jury finds that the  
 17 defendant “formed the intent to kill as a direct response to . . . provocation  
 18 and . . . acted immediately,” i.e., without deliberation and premeditation.  
 19 (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other  
 20 grounds in *People v. Burton* (1995) 12 Cal.4th 186, 200-201.)

21 Provocation sufficient to mitigate a murder to second degree murder  
 22 requires only a finding that the defendant’s subjective mental state was  
 23 such that he did not deliberate and premeditate before deciding to kill.  
 24 (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) Thus, a  
 25 defendant who is subjectively prevented from deliberating because of  
 26 sufficient provocation is guilty of second degree murder rather than first  
 27 degree murder, even if a reasonable person would not have been so  
 28 precluded. (*Id.* at pp. 1294-1296.)

Absent an evidentiary basis, the court is not required to give  
 CALCRIM No. 522. (*People v. Ward* (2005) 36 Cal.4th 186, 215  
 [CALJIC No. 8.73, the predecessor instruction to CALCRIM No. 522].)  
 The only evidence of provocation by Thompson took place during the  
 over-the-fence exchange between him and Sirypangno. However, when  
 Sirypangno, who was obviously agitated by the heated exchange, told  
 Phommachanh about it, Phommachanh did not become agitated. Rather,  
 as related by the testimony of his cousin, Boualouang, Phommachanh told  
 Sirypangno not to worry about it and tried to calm him down. Moreover,  
 Phommachanh left the scene, and, within minutes, returned after receiving  
 a phone call asking him to do so. Upon returning and before getting out  
 of the car, Phommachanh put on a bandana to mask his face. Donning a  
 mask to hide one’s identity is consistent with premeditation and  
 deliberation; it is inconsistent with acting rashly. (See *People v. Woods*,  
*supra*, 8 Cal.App.4th at p. 1595 [mask was evidence of planning, showing  
 murder was premeditated and deliberate].) Moreover, we note that when  
 Phommachanh pointed the gun at Thompson, Thompson put his hand up  
 and said “no.” When the gun did not fire at first, Phommachanh had the  
 presence of mind to clear an unfired round from the chamber by racking  
 back the slide of the gun and proceed with firing five shots. These actions  
 also were not consistent with acting on the basis of provocation.

Phommachanh has failed to show there was substantial evidence that he decided to kill Thompson in response to the alleged provocation, or that he killed Thompson “while in the grip of passion or any intense emotion” resulting from the alleged provocation. (*People v. Brown* (1981) 119 Cal.App.3d 116, 136.) The evidence[] does not support the inference that Phommachanh was overwhelmed with emotion or was provoked by what Thompson, as related by Sirypangno, did. Instead, the evidence supports the inference that Phommachanh, who had a gun in his possession, already had the intent to kill when he returned to the party site. Further, the evidence that he donned a make-shift mask to hide his face supports the inference that he planned and deliberated the murder before getting out of the car upon his return to the scene. In light of these factors, the trial court did not err by failing to instruct with CALCRIM No. 522. [FN26.]

[FN26:] The fact that the trial court instructed on provocation/manslaughter (CALCRIM No. 570) does not change our decision. “If the court through an abundance of caution, or neglect or mistake, gives partial instructions . . . when no such instructions are warranted, it should be ruled as a matter of law that all inquiry into the nature of the evidence on the issue is precluded . . . .” (*People v. Frierson* (1979) 25 Cal.3d 142, 157.)

(Lodgment No. 12 at 51-53.)

“As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988), citing *Stevenson v. United States*, 162 U.S. 313 (1896). When determining whether error occurred, the Court must consider the jury instructions as a whole. *Id.* at 72. Jury instruction error is subject to harmless error analysis, that is, if error is found, relief can only be granted if it had a substantial and injurious effect on the jury’s verdict. *California v. Roy*, 519 U.S. 2, 6 (1996); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

The state court’s determination that there was insufficient evidence to warrant CALCRIM No. 522 was not unreasonable. Judy Rattana, Phommachanh’s girlfriend, testified Sirypangno handed Phommachanh a gun as Phommachanh left the party with Rattana in a black Lexus; Phommachanh put the gun in the glove compartment. (Lodgment No. 5, vol. 18 at 3093.) When they left, Sirypangno was agitated and Phommachanh tried to calm him. (*Id.*) Shortly after Phommachanh left, Sirypangno called Phommachanh and Rattana and Phommachanh returned to the party. (*Id.* at

1 3096.) When they arrived back at the party, Phommachanh put a bandana over his nose  
2 and mouth, pulled the gun out of the glove compartment and got out of the car. (*Id.* at  
3 3097-99.) Sirypangno was fighting in the front yard. (*Id.* at 3102.) Rattana then heard  
4 Phommachanh fire the gun more than five times. (*Id.* at 3102.)

5 Elexander Noble also testified he saw Sirypangno hand Phommachanh the gun  
6 as Phommachanh was leaving the party in the Lexus. (Lodgement No. 5, vol. 17 at  
7 2794.) He further testified that when Rattana and Phommachanh returned to the party,  
8 he saw Phommachanh get out of the Lexus with a bandana covering the lower part of  
9 his face. (*Id.* at 2810.) Phommachanh and the other OKB members waited for  
10 Thompson to exit the party, then Sirypangno threw a punch at Thompson. (*Id.* at 2814-  
11 15.) Two other OKB members then jumped on Thompson. (*Id.* at 2816.) None of the  
12 OKB members called out for help, and no weapons were being used in the fight at that  
13 point. (*Id.*) Phommachanh then pulled the gun out, pointed it at Thompson and tried  
14 to fire it. (*Id.* at 2818, 2822-23.) The gun did not fire right away and appeared to be  
15 jammed or had the safety on. (*Id.* at 2822.) Phommachanh racked the slide back then  
16 fired the gun five times at Thompson and Anderson. (*Id.* at 2823.)

17 Danny Boualouang testified that as they were leaving the party, Sirypangno came  
18 out of the side gate of the house and looked upset. He also saw Phommachanh, who  
19 looked “normal.” (Lodgment No. 5, vol. 16 at 2544.) A fistfight ensued between the  
20 victim, Tylor Thompson, Sirypangno, Steven Joyce, aka “Turtle” (another OKB  
21 member), and Thompson’s friend, Brandon Guaderrama. (*Id.* at 2548-49.) No weapons  
22 or bottles were used during the fight until Phommachanh pulled a gun out of his  
23 waistband and began shooting. (*Id.* at 2551-52.) Boualouang also testified  
24 Phommachanh had a black rag over his nose and mouth. (*Id.* at 2562.)

25 Brandon Guaderrama testified he saw an Asian male yelling at the victim, Tylor  
26 Thompson, as he exited the party. (Lodgment No. 5, Vol. 22 at 3898.) The person  
27 swung a punch at Thompson, and Guaderrama threw a punch at Thompson’s attacker.  
28 (*Id.* at 3900.) Four or five people then began assaulting Guaderrama. (*Id.* at 3901.) He

1 heard gunshots, got up, and ran away. (*Id.* at 3904.)

2 Jeremy Waller testified there was no fighting when he saw a black Lexus pull up  
3 in front of the house and Phommachanh get out of the car with a bandana on his face  
4 waving a gun around and saying “Who wants this?” and “We’re going to do this shit.”  
5 (Lodgment No. 5, vol. 22 at 3790.) Vincent Cagungun testified he saw a person get out  
6 of the black Lexus with a bandana on his face, and he appeared to have a gun. (*Id.* at  
7 3858-59.) Kelly Anderson, the second shooting victim, testified that when  
8 Phommachanh approached Thompson with the gun, Thompson said, “No,” and put his  
9 hands out. (Lodgment No. 5, vol. 23 at 3965.) On cross-examination, Anderson was  
10 confronted with her preliminary hearing testimony by defense counsel as follows:

11 [MS. SUNDAY]: Now, you also described at the preliminary  
12 hearing, didn’t you, that as you were lifting Tylor just before he was shot,  
13 that he made a move to hit the person, and then immediately pulled back  
14 and was defensive and said no? Do you recall that?

15 A: That’s incorrect.

16 Q. Okay. Do you recall being asked this question, “You told us  
17 you had lifted, you were successful in lifting Tylor up, his torso up in front  
18 of you. What happens next?” And then answer, this is page 445, “After  
19 I lifted Tylor up, the gentleman that was approaching us coming from this  
20 way, which is now the third guy he was already in real close proximity to  
21 us. So when Tylor came up he put his hand back as if to strike him, and  
22 then went no, and the hands came down in front?”

23 A. I don’t remember saying that. But if it’s in the transcript, it’s  
24 probably what I said.

25 (Lodgment No. 5, vol. 23 at 3989-90.)

26 Phommachanh claims this testimony supports a provocation defense. But in her  
27 preliminary hearing testimony as read by defense counsel, Anderson testified  
28 Thompson’s hands came down before the first shot was fired. (*Id.*) And on re-direct  
examination, Anderson confirmed Thompson’s arms were “bent at the elbow and the  
palms [were] facing outwards in an open shape.” (*Id.* at 4020.)<sup>5</sup>

<sup>5</sup> At the preliminary hearing, Anderson testified that Thompson “but his hand back as if to  
strike [Phommachanh], and then he went no, and the hands came down in front *and then that’s when*  
*the first gunshot went off.*” (Lodgment No. 4, vol. 3 at 445.) Anderson also testified that Thompson’s  
hands were “bent at the elbow. . . with her hands, her palms facing outward, with all 10 fingers  
raised.” (*Id.*)

1 As the state court correctly noted, there was not substantial evidence that  
2 Phommachanh was provoked. Phommachanh himself was not involved in the fistfight.  
3 The evidence did not establish Phommachanh's subjective mental state was such that  
4 he did not deliberate and premeditate before deciding to kill, *People v. Fitzpatrick*, 2  
5 Cal. App. 4th 1285, 1295-96 (1992) or was afraid for his or his friends' safety. There  
6 was no evidence anyone other than Phommachanh was armed. There was evidence,  
7 however, negating provocation. Phommachanh returned to the party after being called  
8 by Sirypangno who was upset after a perceived insult by Thompson to Sirypangno and  
9 OKB. Phommachanh, however, was not upset; rather, he seemed "normal." (Lodgment  
10 No. 5, vol. 16 at 2544.) Phommachanh attempted to hide his identity by putting a  
11 bandana on his face before getting out of the car with the gun and waiting for the victim  
12 to leave the party. Phommachanh then attempted to shoot the unarmed victim as the  
13 victim raised his hand defensively and said "no" while holding his hands up. When the  
14 gun jammed, Phommachanh had the presence of mind to rack the slide back and  
15 chamber a new round, then shot at the victims five times as they ran away. There is  
16 simply no substantial evidence that Phommachanh was provoked sufficient to warrant  
17 the CALCRIM No. 522 instruction.

18  
19 In any event, any error did not have a substantial and injurious effect on the jury.  
20 *Brecht*, 507 U.S. at 637. CALCRIM No. 522 permits a jury to find a defendant guilty  
21 of second degree murder, as opposed to first degree murder, if they conclude the  
22 defendant was provoked sufficiently such that defendant acted immediately upon being  
23 provoked and thus did not premeditate or deliberate. *People v. Wickersham*, 32 Cal. 3d  
24 307, 329 (1982). The jury's conclusion that Phommachanh was guilty of first degree  
25 murder, and its rejection of voluntary manslaughter/heat of passion, voluntary  
26 manslaughter/imperfect self defense, and defense of self or others, indicates the jury  
27 resolved the question of provocation against him.

28 In his Traverse, Phommachanh raises two other challenges to the jury

1 instructions, namely, that the failure to instruct with CALCRIM No. 522 impermissibly  
2 reduced the prosecution's burden of proof and the trial court's refusal to instruct the  
3 jury with CALCRIM No. 522 violated his Fifth Amendment right not to testify.  
4 (Traverse at 41-47, ECF No. 29.) As this Court has already noted, "[a] Traverse is not  
5 the proper pleading to raise additional grounds for relief." *Cacoperdo*, 37 F.3d at 507.  
6 Additionally, this claim is not exhausted. Nevertheless, this Court may deny the  
7 petition if it is "perfectly clear that the applicant does not raise even a colorable federal  
8 claim." *Cassett*, 406 F.3d at 624.

9 The refusal to instruct the jury with CALCRIM No. 522 had no effect on the  
10 prosecution's burden of proof. The prosecution was still required to prove every  
11 element of the crimes with which Phommachanh was accused beyond a reasonable  
12 doubt. CALCRIM No. 522 would only have provided the jury with a theory of why the  
13 prosecution had not met that burden. As discussed above, CALCRIM No. 522 was not  
14 warranted in this case.

15 Nor did the refusal to instruct with CALCRIM No. 522 violate Phommachanh's  
16 Fifth Amendment rights. Phommachanh points to a statement by the trial judge in  
17 which he stated that CALCRIM No. 522 was not warranted because the jury had not  
18 heard anything about Phommachanh's beliefs which would support a provocation  
19 defense. (*See* Traverse at 44, ECF No. 29.) While testimony by Phommachanh is one  
20 way such evidence would have been placed before the jury, the defense could have  
21 presented circumstantial evidence of Phommachanh's beliefs as well. Nothing in the  
22 trial judge's statement *required* Phommachanh to testify.

23 For the foregoing reasons, the state court's denial of this claim was neither  
24 contrary to, nor an unreasonable application of, clearly established Supreme Court law.  
25 *Williams*, 529 U.S. at 412-13. Phommachanh is not entitled to relief as to this claim.

26 *5. Sufficiency of Evidence as to the Gang Enhancements (claim four)*

27 Phommachanh contends there was insufficient evidence to support the gang  
28 allegations. (Pet. at 31-40, ECF No. 1; Traverse at 48-60, ECF No. 29.) Specifically,

he claims there was insufficient evidence to establish the crimes were committed for the benefit of a gang, and that he intended to promote, further or assist criminal conduct by the gang. (Pet. at 31-40, ECF No. 1; Traverse at 48-60, ECF No. 29.) Respondent counters that the state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 21-23, ECF No. 9.)

Phommachanh raised this claim in his petition for review in the California Supreme Court. (See Lodgment No. 15 at 19, Lodgment No. 16 at 19.)<sup>6</sup> That court denied the petition without prejudice to any relief Phommachanh would be entitled to under *People v. Favor*. (Lodgment No. 17; see also Footnote 3 of this Report and Recommendation.) Accordingly, this Court must "look through" to the California appellate court's opinion denying the claim as the basis for its analysis. *Ylst*, 501 U.S. at 805-06. That court applied clearly established Supreme Court law in its analysis, namely, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). (See Lodgment No. 12 at 22.) In assessing a sufficiency of the evidence claim, the Supreme Court has stated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005), quoting *Jackson*, 443 U.S. at 319. Even where the evidence supporting a conviction is circumstantial, this Court must presume the trier of fact resolved conflicting inferences in favor of the prosecution. *Jackson*, 443 U.S. at 326. In determining whether sufficient evidence has been presented, the Court must accept the elements of the crime as defined by state law. See *Jackson*, 443 U.S. at 324, n. 16. The state appellate court wrote:

The prosecution may, as in this case, present expert testimony on criminal street gangs to prove the elements of the criminal street gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-48;

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<sup>6</sup> As Respondent notes, Sirypangno raised this claim in his petition for review, and Phommachanh joined in Sirypangno's arguments. (See Lodgment No. 15 at 19, Lodgment No. 16 at 19.)

1 *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322; *People v. Gardeley*  
 2 (1996) 14 Cal.4th 605, 617-620 (*Gardeley*).) “[E]xpert testimony about  
 3 gang culture and habits is the type of [circumstantial] evidence a jury may  
 4 rely on to reach . . . a finding on a gang allegation.” (*People v. Ferraez*  
 5 (2003) 112 Cal.App.4th 925, 930 (*Ferraez*).) Permissible expert  
 6 testimony includes the size, composition or existence of the gang, the  
 7 gang’s turf or territory, an individual defendant’s membership in the gang,  
 8 the primary activities of the gang, whether or how the crime was  
 9 committed to benefit or promote the gang, and motivation for a particular  
 10 crime. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1514.)

11 With respect to the gang benefit element of section 186.22,  
 12 subdivision (b)(1), Detective Hatfield, the prosecution’s gang expert,  
 13 testified that gangs gain what they deem as respect by committing violent  
 14 crimes against general members of the community as well as against  
 15 members of rival gangs. In his general testimony about gangs, Hatfield  
 16 also said acts of disrespect to a gang or gang member are not left  
 17 unanswered. An act of disrespect to an individual gang member is  
 18 considered an act of disrespect to the gang. Verbal insults can constitute  
 19 an act of disrespect, and such verbal exchanges often escalate into violent  
 20 confrontations. Fellow gang members typically provide backup to a  
 21 disrespected gang member.

22 The gang detective also testified it is not unusual for a gang member  
 23 to get into a physical fight with someone who had verbally disrespected  
 24 him — even if the person had no gang ties — and for the fight to lead to  
 25 someone being shot to death. Hatfield said that such a scenario would  
 26 benefit the gang because it would enhance the gang’s reputation for  
 27 violence and increase the level of fear and intimidation the gang has in the  
 28 community.

Significantly, Hatfield’s expert testimony provided context to the  
 jury about Sirypangno’s and Thompson’s heated over-the-fence exchange.  
 Specifically, the jury heard evidence that Sirypangno believed Thompson  
 had called OKB members “bitches” and the exchange concluded with  
 Thompson saying “suck my dick,” and Sirypangno throwing a wood plank  
 over the fence and suggesting that he would physically confront  
 Thompson soon.

Afterward, Sirypangno told Phommachanh about the exchange and  
 waited outside for Thompson to leave the backyard. As we waited for  
 Thompson, Sirypangno asked a friend to phone Phommachanh, who had  
 left, to return. Upon returning, Phommachanh donned a mask, retrieved  
 the gun from the glove compartment, waved the gun after exiting the car  
 and shouted “who wants it.” Phommachanh then joined Sirypangno,  
 Joyce and Giraud, who were lined up in front of the house waiting for  
 Thompson to emerge from the backyard. When Thompson emerged,  
 Sirypangno approached him and said “you the fool who told me to suck  
 your dick,” thereby informing Phommachanh who was the target.

The jury could also consider an earlier incident at the party when  
 Sirypangno and Phommachanh were asked to leave. Sirypangno  
 responded by brandishing the gun and saying: “This is OKB.”  
 Phommachanh’s response was to flash gang hand signs.

1 The totality of the evidence was legally sufficient for the jury to  
 2 conclude that Phommachanh and Sirypangno committed the crimes “for  
 3 the benefit of, at the direction of, or in association with [a] criminal street  
 4 gang.” (§ 186.22, subd. (b)(1).) Under existing case law, the fact that  
 5 Phommachanh perpetrated the crimes in the company of fellow gang  
 6 members supports an inference that the crimes were committed for the  
 7 benefit of or in association with the gang. (See *People v. Miranda*, *supra*,  
 8 192 Cal.App.4th at pp. 412-413 [commission of crime accompanied by  
 9 gang members supports inference defendant intended to benefit gang];  
 10 *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*)  
 11 [commission of crime with fellow gang members support inference crime  
 12 was committed in association with gang].) The fact that Phommachanh  
 13 killed Thompson and committed the other crimes in front of witnesses  
 14 after Thompson insulted fellow gang member Sirypangno also supports an  
 15 inference these crimes were committed for the benefit of the OKB gang.  
 16 Case law recognizes that “[a] community cowed by gang intimidation is  
 17 less likely to report gang crimes and to assist in their prosecution. The  
 18 gang benefit is plain.” (*People v. Margarejo* (2008) 162 Cal.App.4th 102,  
 19 110; see also *Gardeley*, *supra*, 14 Cal.4th at p. 619 [expert testimony that  
 20 crimes committed by gang member were committed to instill fear in  
 21 community sufficient to support gang enhancement allegations]; *Ferraez*,  
 22 *supra*, 112 Cal.App.4th at p. 931 [finding substantial evidence supported  
 23 gang enhancement when expert opinion was couple[d] with other  
 24 testimony from which jury could reasonably infer crime was gang  
 25 related].)

26 Sirypangno maintains the assault on Thompson was committed for  
 27 a personal reason — a verbal argument between him and Thompson —  
 28 and not to benefit OKB. Sirypangno claims he was personally insulted by  
 Thompson’s “suck his dick” comment; this was the impetus for the fight  
 — not gang-related issues, such as gang territory or past grievances with  
 a rival gang. Relying on Thompson’s lack of gang membership and the  
 absence of gang signs and other manifestations of the OKB gang, [FN12]  
 Sirypangno urges that the most the prosecution showed was a possibility  
 that the crimes were for the benefit of the gang. We disagree.

FN12. Although there was no calling out of “OKB” and no  
 flashing of gang hand signals during the fatal confrontation  
 with Thompson, Sirypangno had shouted, “This is OKB,”  
 and Phommachanh had flashed hand signals when they were  
 confronted by Farhan and others earlier that evening.

To be sure, “[n]ot every crime committed by gang members is  
 related to a gang . . . .” (*People v. Albillar* (2010) 51 Cal.4th 47, 60  
 (*Albillar*).) Further, “it is conceivable that several gang members could  
 commit a crime together, yet be on a frolic and detour unrelated to the  
 gang.” (*Morales*, *supra*, 112 Cal.App.4th at p. 1198.) However, the issue  
 before us is not whether there was evidence from which the jury could  
 have concluded the murder and other crimes were personal rather than  
 gang related. Rather the issue is whether the jury was presented with  
 evidence that was reasonable, credible and of solid value from which a  
 reasonable trier of fact could find the enhancement was true beyond a  
 reasonable doubt. Here, the jury heard such evidence. Ultimately it was  
 for the jury to resolve any evidentiary disputes, and we have no power to  
 reweigh the evidence, make credibility calls or substitute our conclusion

1 for the jury's. (*Albillar, supra*, at p. 60; *Ferraez, supra*, 112 Cal.App.4th  
2 at p. 931.)

3 Sirypangno's reliance on *People v. Ochoa* (2009) 179 Cal.App.4th  
4 650 (*Ochoa*), *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 (*Ramon*)  
5 and *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) is  
6 misplaced.

7 *Ochoa, supra*, 179 Cal.App.4th 650, in which the Court of Appeal  
8 reversed true findings on gang allegations in connection with the  
9 defendant's conviction for carjacking and being a felon in possession of  
10 a firearm, is distinguishable. The defendant was not accompanied by  
11 fellow gang members; he acted alone. (*Id.* at p. 662.) Further, there was  
12 no evidence of gang names, gang signals or other manifestations typically  
13 associated with gangs. (*Ibid.*) The appellate court observed that "[a] gang  
14 expert's testimony alone is insufficient to find an offense gang related"  
15 and that the "'record must provide some evidentiary support, other than  
16 merely the defendant's record of prior offenses and past gang activities or  
17 personal affiliations, for a finding that the crime was committed for the  
18 benefit of, at the direction of, or in association with a criminal street gang.'  
19 [Citation.]" (*Id.* at p. 657, italics omitted.)

20 *Ramon, supra*, 175 Cal.App.4th 843, is similarly distinguishable  
21 because that case involved the propriety and sufficiency of expert  
22 testimony where there is no supporting evidence. In *Ramon*, officers  
23 stopped the defendant, a conceded gang member, while he was driving a  
24 stolen vehicle within his gang's territory with a fellow gang member. (*Id.*  
25 at p. 847.) Inside the vehicle was a loaded, unregistered firearm under the  
26 driver's seat. The defendant was charged with receiving a stolen vehicle,  
27 being a felon in possession of a firearm and carrying a loaded firearm in  
28 public for which he was not a registered owner and corresponding gang  
enhancements. The jury convicted the defendant and found the gang  
allegations to be true. (*Id.* at pp. 847–848.) The appellate court vacated  
the gang enhancements, concluding there was insufficient foundation for  
the expert's opinions:

19 "The People's expert simply informed the jury of how he  
20 felt the case should be resolved. This was an improper  
21 opinion and could not provide substantial evidence to support  
22 the jury's finding. There were no facts from which the expert  
23 could discern whether [the defendant and his companion]  
24 were acting on their own behalf the night they were arrested  
25 or were acting on behalf of [their gang]. While it is possible  
26 the two were acting for the benefit of the gang, a mere  
27 possibility is nothing more than speculation. Speculation is  
28 not substantial evidence." (*Id.* at p. 851.)

29 Unlike *Ochoa, supra*, 179 Cal.App.4th 650 and *Ramon, supra*, 175  
30 Cal.App.4th 843, here the expert's testimony was not the only evidence  
31 that the offenses were gang related.

32 *Albarran, supra*, 149 Cal.App.4th 214 is not helpful to Sirypangno  
33 and Phommachanh. The Court of Appeal in *Albarran* did not consider  
34 whether there was sufficient evidence to support gang enhancement  
35 allegations, but rather, whether gang evidence was admissible with respect

1 to the underlying offenses at issue in that case. (*Id.* at pp. 222–223.) The  
 2 fact that crimes in *Albarran* occurred at a birthday party is of no  
 significance.

3 As to the second element of section 186.22, subdivision (b)(1) —  
 4 the specific intent issue — Sirypangno again relies on evidence that the  
 initial assault on Thompson was personal and argues the prosecution  
 5 showed no more than the possibility that he had the requisite specific  
 intent to promote, further, or assist in gang crime. As explained above, we  
 reject Sirypangno’s restrictive view of the evidence.

6  
 7 Sirypangno’s second argument concerning the lack of the requisite  
 specific intent is that there was no evidence showing the crimes furthered  
 some other criminal conduct by OKB.

8  
 9 The problem with Sirypangno’s argument is that he has misread or  
 misconstrued the statute. Section 186.22, subdivision (b)(1) does not  
 require the specific intent to further some other criminal conduct by the  
 10 gang; “[w]hat is required is the ‘specific intent to promote, further, or  
 assist in any criminal conduct by gang members . . . .’” (*Morales, supra*,  
 11 112 Cal.App.4th at p. 1198, italics added.) The overwhelming majority of  
 decisions by Courts of Appeal throughout the state have subscribed to this  
 12 interpretation of the statute — namely section 186.22, subdivision (b)(1)  
 requires the specific intent to aid *any* criminal activity by gang members.  
 (See, e.g., *People v. Villalobos* (2006) 145 Cal.App.4th, 310, 322  
 13 (*Villalobos*); *People v. Romero* (2006) 140 Cal.App.4th 15, 19–20; *People*  
 14 *v. Martinez* (2008) 158 Cal.App.4th 1324, 1332; *People v. Leon* (2008)  
 15 161 Cal.App.4th 149, 163.)

16 Sirypangno, on the other hand, principally relies on two federal  
 opinions by the Ninth Circuit Court of Appeals (*Garcia v. Carey* (9th  
 17 Cir.2005) 395 F.3d 1099 and *Briceno v. Scribner* (9th Cir.2009) 555 F.3d  
 18 1069), which have now been repudiated by our Supreme Court in *Albillar*,  
*supra*, 51 Cal.4th 47, 65–66.) [footnote 13 omitted.]

19 In *Garcia v. Carey, supra*, 395 F.3d at page 1101 and *Briceno v.*  
*Scribner, supra*, 555 F.3d at page 1079, divided panels of the Ninth Circuit  
 20 held section 186.22, subdivision (b)(1) requires evidence that a defendant  
 had the specific intent to further or facilitate *other* criminal conduct, i.e.,  
 21 “other criminal activity of the gang apart” from the offenses for which the  
 defendant was convicted.

22 In *Albillar, supra*, 51 Cal.4th at page 66, the state’s high court  
 23 rejected this interpretation of the statute by the Ninth Circuit and adopted  
 the one set forth by the majority of appellate courts in the state. “[T]he  
 24 scienter requirement in section 186.22, [subdivision] (b)(1)—i.e., ‘the  
 specific intent to promote, further or assist in any criminal conduct by  
 25 gang members’ — is unambiguous and applies to any criminal conduct,  
 without a further requirement that the conduct be ‘apart from’ the criminal  
 26 conduct underlying the offense of conviction sought to be enhanced.”  
 (*Albillar, supra*, at p. 66.) We, of course, are bound by the *Albillar*  
 27 conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d  
 28 450, 455.)

1 As to the argument that section 186.22, subdivision (b)(1) requires  
 2 the specific intent to promote, further, or assist a gang-related crime, the  
*Albillar* court observed:

3 “The enhancement already requires proof that the defendant  
 4 commit a gang-related crime in the first prong — i.e., that the  
 5 defendant be convicted of a felony committed for the benefit  
 6 of, at the direction of, or in association with a criminal street  
 7 gang. [Citation.] There is no further requirement that the  
 8 defendant act with the specific intent to promote, further, or  
 9 assist a gang; the statute requires only the specific intent to  
 10 promote, further, or assist criminal conduct by *gang*  
*members.*” (*Albillar, supra*, 51 Cal.4th at p. 67; original  
 11 italics.)

12 In other words, section 186.22, subdivision (b)(1) “applies when a  
 13 defendant has personally committed a gang-related felony with specific  
 14 intent to aid members of that gang.” (*Albillar, supra*, at p. 68.)

15 With the law now settled, “[c]ommission of a crime in concert with  
 16 known gang members is substantial evidence which supports the inference  
 17 that the defendant acted with the specific intent to promote, further or  
 18 assist gang members in the commission of the crime.” (*Villalobos, supra*,  
 19 145 Cal.App.4th at p. 322.)

20 We conclude there is substantial evidence that Sirypangno and  
 21 Phommachanh had the requisite specific intent to promote, further and  
 22 assist criminal conduct by gang members. Sirypangno and Phommachanh  
 23 were OKB gang members attending a party where their very presence was  
 24 questioned earlier that evening, leading them to jump over the backyard  
 25 fence. Although no violence erupted during that incident, Sirypangno  
 26 called out “OKB” and Phommachanh flashed gang hand signs. Later,  
 27 Sirypangno believed he heard Thompson insult him (“suck my dick”) and  
 28 his gang (the “bitches” remark). Sirypangno informed Phommachanh of  
 the over-the-fence exchange. Also, Sirypangno gave Phommachanh the  
 firearm before Phommachanh left the party. Sirypangno then waited  
 outside for Thompson to emerge from the backyard. A reasonable  
 inference was that Sirypangno told Phommachanh about the insults to  
 secure gang backup for his ensuing fight with Thompson. Another  
 reasonable inference was that Phommachanh planned to return to the party  
 with the firearm to provide the backup. Detective Hatfield, the  
 prosecution’s gang expert, testified that respect toward gang members is  
 paramount in gang culture and gang members do not leave insults  
 unanswered. Verbal insults can constitute an act of disrespect, and such  
 verbal exchanges often escalate into violent confrontations. Fellow gang  
 members typically provide backup to a gang member, who has been  
 disrespected. Hatfield also testified that violent crimes benefit gangs  
 because as news of their crimes is spread in the community, the level of  
 public fear and intimidation increases. “Expert opinion that particular  
 criminal conduct benefitted a gang by enhancing its reputation . . . can be  
 sufficient to raise the inference that the conduct was ‘was committed for  
 the benefit of . . . a [ ] criminal street gang’ within the meaning of section  
 186.22, [subdivision] (b)(1).” (*Albillar, supra*, 51 Cal.4th at p. 63.) A  
 jury could have reasonably concluded that in committing the charged  
 crimes, Sirypangno and Phommachanh acted with the requisite specific

1 intent — namely, “to promote, further or assist gang members in the  
 2 commission of the crime.” (*Villalobos, supra*, 145 Cal.App.4th at p. 322.)  
 3 The jury reasonably could have inferred that Sirypangno and  
 4 Phommachanh acted “with the specific intent to promote, further, or assist  
 5 in any criminal conduct by [fellow] gang members.” (§ 186.22, subd.  
 6 (b)(1).) The fact that Sirypangno was personally insulted by Thompson  
 7 did not remove the case from application of section 186.22, subdivision  
 8 (b)(1). [footnote 14 omitted.]

9 (Lodgment No. 12 at 22-32.)

10 As the state court noted, “[t]o subject a defendant to a gang enhancement  
 11 (§ 186.22(b)(1)), the prosecution must prove the underlying crime was ‘committed for  
 12 the benefit of, at the direction of, or in association with any criminal street gang’ (the  
 13 gang-related prong), ‘with the specific intent to promote, further, or assist in any  
 14 criminal conduct by gang members’ (the specific intent prong).” *People v. Rios*, 222  
 15 Cal. App. 4th 542, 705 (2013) (quoting Cal. Penal Code § 186.22, subd. (b)(1) and  
 16 citing *People v. Albillar*, 51 Cal.4th 47, 59-60 (2010).)<sup>7</sup> “Expert opinion that particular  
 17 criminal conduct benefitted a gang by enhancing its reputation for viciousness can be  
 18 sufficient to raise the inference that the conduct was ‘committed for the benefit of ... a  
 19 [ ] criminal street gang’ within the meaning of section 186.22(b)(1).” *Albillar*, 51 Cal.  
 20 4th at 63. Such expert opinion was present in this case. Detective Hatfield testified that  
 21 in his expert opinion, Phommachanh and Sirypangno were members of OKB.  
 22 (Lodgment No. 5, vol. 26 at 4620-23.) Other, independent evidence established this as  
 23 well. (*See* Lodgment No. 5, vol. 16 at 2526; vol. 17 at 2770; vol. 18 at 3054, 3061.)  
 24 OKB was documented as a criminal street gang in 1994, and members had committed  
 25 many crimes, including witness intimidation, drug offenses, burglaries, auto thefts,  
 26 batteries, assaults, beatings, stabbings, shootings, and murders. (Lodgment No. 5, vol.  
 27 26 at 4543, 4551.) Specifically, Hatfield testified OKB members had been prosecuted  
 28 for gang related crimes in 2004, 2003, and 2002. (*Id.* at 4563-68.)

Hatfield also testified that in addition to Phommachanh and Sirypangno, several

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<sup>7</sup> Phommachanh does not challenge the other requirements of the statute. *See* Cal. Penal Code section 186(e) and (f); *People v. Gardeley*, 14 Cal. 4th 605, 616-17 (1996).

1 other OKB gang members or associates were at the scene of the crime — Steven Joyce,  
2 Devin Giraud, Judy Rattana and Julie Nguyen — who either participated in the physical  
3 altercation with the victim, Thompson, threatened party-goes with retaliation by OKB,  
4 or assisted in Phommachanh’s and Sirypangno’s getaway from the scene. (*Id.* at 4568-  
5 87.) According to Hatfield, gang members gain respect from fellow gang members and  
6 move ahead in a gang by “committing crimes, especially crimes of violence against  
7 other individuals, whether it be your rivals or whether it be just anybody in general.”  
8 (*Id.* at 4538.) Committing crimes shows you are “tough enough, backing your gang set  
9 . . . because if you get disrespected, the gang can get disrespected.” (*Id.* at 4539.)  
10 Calling a gang member a name is an act of disrespect. (*Id.* at 4540.) If a gang member  
11 shot and killed someone, he would gain respect within the gang, and the gang itself  
12 would benefit by being more well known and feared. (*Id.* at 4623.) Applying the  
13 *Jackson* standard, this is sufficient evidence for a reasonable jury to conclude that the  
14 crimes committed by Phommachanh were for the benefit of OKB. *Jackson*, 443 U.S.  
15 at 319.

16       There was also sufficient evidence to support the jury’s conclusion that  
17 Phommachanh committed the crimes with the specific intent to promote, further, or  
18 assist in any criminal conduct by gang members. Evidence was presented that on the  
19 way to the Mira Mesa party, Phommachanh told someone who called him on his phone  
20 to bring a “strap” (gang jargon for a gun) to the party because there might be some  
21 problems there. (Lodgment No. 5, vol. 16 at 2525.) When Phommachanh, Sirypangno  
22 and other OKB members Steven Joyce and Devin Giraud arrived at the Mira Mesa  
23 party, they were challenged by individuals who were monitoring entrance into the party.  
24 Phommachanh said that if they were not let in, there would be trouble. (*Id.* at 2536.)  
25 Rattana also told the people manning the entrance to the party “not to mess with these  
26 guys.” (*Id.* at 2537.)

27       Once inside, an OKB associate, Mai threatened to have a party attendee “jumped”  
28 by OKB as reprisal for blowing smoke in her face. (Lodgment No. 5, vol. 20 at 3397-

99; vol. 21 at 3535.) After making party guests uncomfortable, Phommachanh, Sirypangno and their friends were asked to leave; in response, Sirypangno displayed a gun, pointed it at a party guest, and Phommachanh flashed an OKB sign, saying “This is OKB.” (Lodgment No. 5, vol. 19 at 3140-41.) Mai also later shouted OKB during an altercation with Natasha Richardson. (Lodgment No. 5, vol. 21 at 3553-54.) Phommachanh and Sirypangno jumped over the fence and out of the yard, but Sirypangno lingered outside the fence and thought he heard the victim Thompson insult him and OKB by calling them “bitches.” (Lodgment No. 5, vol. 17 at 2787-88.) An argument between Sirypangno and Thompson ensued, with Thompson eventually telling Sirypangno to “suck my dick.” (*Id.* at 2788-90, vol. 22 at 3777-83; vol. 23 at 3949-50.) As Phommachanh was leaving, Sirypangno told him about Thompson’s insults; Phommachanh tried to calm Sirypangno down, then left. (Lodgment No. 5, vol. 16 at 2544; vol. 17 at 2791-94.) As Phommachanh was leaving, Sirypangno passed him a gun. (*Id.* at 2794.) Within five minutes of leaving, Phommachanh received a phone call and returned to pick up Sirypangno. (*Id.* at 2795; vol. 18 at 3093, 3096.) Upon returning to the party, Phommachanh exited the car with a bandana on his face and a gun in his hand and shot the victims. (Lodgment No. 5, vol. 17 at 2818-28; vol. 18 at 3097-3102; vol. 23 at 3965-69.) Following the shootings, Phommachanh enlisted fellow gang members to help him cover up the crime. He hid the gun in fellow OKB member Devin Giraud’s house. (Lodgment No. 5, vol. 16 at 2572-73.) Phommachanh then told Rattana to put Danny Boulaloung’s bloody clothes in a bag and that OKB “homies” would pick it up. (Lodgment No. 5, vol. 16 at 2577; vol. 18 at 3106, 3109-10; vol. 19 at 3155-56.)

A reasonable jury could conclude from this evidence, and the expert testimony of Hatfield, that Phommachanh intended promote, further or assist conduct by OKB. As the California Supreme Court has noted:

The enhancement already requires proof that the defendant committed a gang-related crime in the first prong — i.e., that the defendant be convicted of a felony committed for the benefit of, at the direction of, or

1 in association with a criminal street gang. [citation omitted]. There is no  
 2 further requirement that the defendant act with the specific intent to  
 3 promote, further, or assist a gang; the statute requires only the specific  
 4 intent to promote, further, or assist criminal conduct by *gang members*.

5 *Albillar*, 51 Cal. 4th at 67.

6 Applying this standard, a reasonable jury could have concluded that  
 7 Phommachanh intended to shoot the victims because Thompson had disrespected  
 8 Sirypangno, a fellow OKB member, and the OKB gang itself. As Hatfield testified,  
 9 gang members commit crimes when a gang member is disrespected “because if you get  
 10 disrespected, the gang can get disrespected,” and that calling a gang member a name is  
 11 an act of disrespect. (Lodgment No. 5, vol. 26 at 4539-40.) Shooting a person who  
 12 disrespected the gang or gang members benefits the gang by increasing its notoriety and  
 13 fear of the gang. (*Id.* at 4623.) Thus, the jury could have concluded that by shooting  
 14 the victims, one of whom had disrespected an OKB member (Sirypangno), where  
 15 onlookers would witness the violence, Phommachanh intended to promote OKB’s  
 16 reputation for violence, show that OKB members would not tolerate perceived  
 17 disrespect of the gang or gang members, and instill fear in community members.

18 For the foregoing reasons, the state court’s denial of this claim was neither  
 19 contrary to, nor an unreasonable application of, clearly established Supreme Court law.  
 20 *Williams*, 529 U.S. at 412-13. Phommachanh is not entitled to relief as to this claim.

## 21 6. *Evidentiary Hearing*

22 On page 62 of Phommachanh’s Traverse, he asks this Court to conduct an  
 23 evidentiary hearing on his claims. (Traverse at 62, ECF No. 29.) Evidentiary hearings  
 24 in § 2254 cases are governed by AEDPA, which “substantially restricts the district  
 25 court’s discretion to grant an evidentiary hearing.” *Baja v. Ducharme*, 187 F.3d 1075,  
 26 1077 (9th Cir. 1999). The provisions of 28 U.S.C. § 2254(e)(2) control this decision:

27 (2) If the applicant has failed to develop the factual basis of a claim  
 28 in State court proceedings, the court shall not hold an evidentiary hearing  
 on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C.A. § 2254(e)(2) (West 2006).

In order to determine whether to grant an evidentiary hearing, the court must first “determine whether a factual basis exists in the record to support the petitioner’s claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 669 (9th Cir. 2005) (citing *Baja*, 187 F.3d at 1078). If not, the court must “ascertain whether the petitioner has ‘failed to develop the factual basis of the claim in State court.’” *Id.* at 669-70. A failure to develop the factual basis of a claim in state court implies “some lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *See Williams v. Taylor*, 529 U.S. 420, 432 (2000). The Supreme Court has said that “[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.” *Id.* at 437.

Pursuant to *Cullen v. Pinholster*, 563 U.S. \_\_\_, 131 S. Ct. 1388, 1402 (2011), Phommachanh is limited to the facts presented to the state court. In *Pinholster*, the Supreme Court held that where habeas claims have been decided on their merits in state court, a federal court’s review must be confined to the record that was before the state court. *Id.* at 1398. Phommachanh can only proceed to develop additional evidence in federal court if either § 2254(d)(1) or (d)(2) is first satisfied. *See Sully v. Ayers*, \_\_\_ F.3d \_\_\_, No. 2013 WL 3988674 at \*14 (9th Cir. Aug. 6, 2013) (stating that “an evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes habeas relief” and citing *Pinholster*, 131 S.Ct. at 1411, n. 20). It has not been here for all the reasons discussed above. Accordingly, the Court recommends Phommachanh’s

1 request for an evidentiary hearing be **DENIED**.

2 **V. CONCLUSION**

3 The Court submits this Report and Recommendation to United States District  
4 Judge Michael M. Anello under 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(d)(4)  
5 of the United States District Court for the Southern District of California. For the  
6 reasons outlined above, **IT IS HEREBY RECOMMENDED** that the Court issue an  
7 order: (1) approving and adopting this Report and Recommendation, and (2) directing  
8 that Judgment be entered **DENYING** the request for an evidentiary hearing and  
9 **DENYING** Petition for Writ of Habeas Corpus.

10 **IT IS ORDERED** that no later than **May 30, 2014** any party to this action may  
11 file written objections with the Court and serve a copy on all parties. The document  
12 should be captioned "Objections to Report and Recommendation."

13 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with  
14 the Court and served on all parties no later than **June 13, 2014**. The parties are advised  
15 that failure to file objections within the specified time may waive the right to raise those  
16 objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th  
17 Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

18 **IT IS SO ORDERED.**

19 **DATED: May 9, 2014**

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21   
22 **Hon. Mitchell D. Dembin**  
23 **U.S. Magistrate Judge**  
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